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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1079

BENJAMIN M. PERLSTEIN AND HARRY PAUL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAUL M. SALSBURG,
Counsel for Petitioners.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Third Circuit.

Summary Statement of Matters Involved.

(a)

The Indictment.

Benjamin M. Perlstein and Harry Paul, both lawyers, petitioners herein, were convicted a second time on count 1 of an indictment charging them with unlawfully conspiring to influence 3 named witnesses in the District Court of the

United States for the District of New Jersey, and the Grand Jury thereof, and corruptly * * * to obstruct and impede the due administration of justice therein.

The indictment, which was returned on April 16, 1940, alleged in count 1 that the petitioners and two other defendants, Short and Aluise, "from on or about the 15th day of October, *1937*,* and continuously thereafter up to and including the date of the filing" of the indictment "did * * * knowingly * * * conspire * * * and agree together in violation of Title 18 U. S. C. Section 88 (Sec. 37 of the Criminal Code) * * * to influence, intimidate and impede 3 witnesses, namely: John A. Graham, Edward S. Graham and Henry S. Speed in the District Court of the United States for the District of New Jersey, and the Grand Jury thereof, and corruptly * * * to influence, obstruct and impede the due administration of justice therein, in violation of Title 18 U. S. C. Section 241 (Sec. 135 of the Criminal Code)", by and in the means and manner as alleged in the indictment (R. 13-19).

The second count charged them and the other two defendants from April 1st, 1937, to the filing date of the indictment with conspiring unlawfully to have in their possession, custody and under their control a still not registered according to the Internal Revenue Laws of the United States; to carry on the business of a distiller without having given bond as required by the Internal Revenue Laws; and to make and ferment mash fit for distillation and for the production of spirits and alcohol in a distillery not duly authorized by the Internal Revenue Laws. *It is further alleged in said count that as a further part of said conspiracy that the said defendants would conceal their acts and the facts as aforesaid, and would do such other further and*

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* Emphasis throughout this petition is that of counsel.

different acts as they might deem necessary and advisable to prevent the disclosure of the existence of said conspiracy, would attempt to suppress evidence of the existence of said conspiracy, and any transaction in furtherance thereof, and would attempt to suppress and to obtain the suppression of any and all information and evidence of the acts made and done in furtherance of said conspiracy (R. 19-22).

The second count dropped out of the case at the first trial as far as the present petitioners are concerned. At that time, the Trial Court directed the acquittal of Paul upon the second count and the Jury returned a verdict of not guilty as to Perlstein on the same count.

According to the allegations relating to count 1 of the indictment, an investigation was begun on November 1, *1939*, by Special Investigators of the Federal Alcohol Tax Unit with a view to discovering violations of the laws of the United States in the District of New Jersey by ascertaining the identity of the owners and possessors of a certain unregistered still and a quantity of finished untaxed alcohol which had been seized in Atlantic City, New Jersey, by State enforcement officers on October 13, *1937*. The investigation resulted in the filing of a complaint before a United States Commissioner on January 17, *1940*, and a second complaint before another Commissioner on February 14, *1940*, and an inquest by the Grand Jury for the District of New Jersey for the December Term 1939 as extended by order of court entered "on the 11th day of January, *1940*." The indictment further alleged that the petitioners and the two other defendants, in fulfillment of the conspiracy, corruptly influenced, intimidated and impeded the three named witnesses who they knew were about to be called before the Commissioners and the Grand Jury in connection with the investigation and that, thereby, they obstructed the due administration of justice in the District Court of the United States for the District of New Jersey.

It therefore clearly appears that the indictment charged the defendants with a conspiracy "on or about the 15th day of October, 1937" (contrary to Sec. 37 of the Criminal Code) to intimidate and impede witnesses and to obstruct the due administration of justice *in a court of the United States or before a United States Commissioner* (in violation of Sec. 135 of the Criminal Code) notwithstanding that no such proceedings were instituted for more than two years after the formation of the alleged conspiracy.

The indictment then specified seven overt acts, the first of which was alleged to have been committed on October 15, *1937*, and the second on February 7, *1939*,—both well prior to the institution of the proceedings before the Commissioners and the Grand Jury, or even before the commencement of the investigation by the Special Investigators of the Alcohol Tax Unit. Thus, according to the indictment, the alleged conspiracy, by virtue of the statute's prescription with respect to the commission of an overt act (Sec. 37 of the Criminal Code), became an indictable and punishable offense more than two years before there was any proceeding in a United States court or before a Commissioner in respect whereof the petitioners could either have intimidated witnesses or obstructed justice as alleged in the indictment.

The government's proofs at trial conformed with the allegations of the indictment as to the formation of the conspiracy on October 15, 1937, the commission of an overt act on the same day, as well as the commission of a similar act on February 7, 1939, and the commencement of the federal proceedings before the Commissioners and the Grand Jury for the District of New Jersey in January of 1940. In their brief, before the Circuit Court on this appeal, counsel for the government speaking with relation to the proofs at trial affirm that "It was established that the conspiracy to endeavor to influence witnesses and obstruct the due

administration of justice began on October 13, 1937, immediately after the still was raided'' (R. 411).

In short, the petitioners were charged and found guilty of having conspired to commit a specific offense against the United States at a time, when, under the allegations of the indictment, as well as under the proofs at trial, no such offense was committable.

(b)

Explanation of Facts Relating to Alleged Overt Acts.

Petitioners are lawyers admitted to practice in the State of New Jersey and in the United States District Court (R. 188, 249). As a result of their conviction at the first trial they have been under suspension in both Courts since the early part of 1941. A lawyer convicted of a crime in the State of New Jersey, unless that conviction be reversed, must be disbarred. In re *Cahill,* 66 N. J. L. 527.

On October 13, 1937, New Jersey State officers, finding an unregistered still in operation at the Atlantic City Garbage Disposal Plant, seized the same. Joseph Myers, who was on the premises, was immediately arrested. The following day a State warrant was sworn out for the arrest of John A. Graham, the City's tenant of the Garbage Disposal Plant, and he surrendered on October 15, 1937 (R. 38-40).

Perlstein was retained as Myers' lawyer by Aluise on October 13, 1937. Myers was never indicted. On October 15, 1937, Perlstein became John Graham's lawyer. John Graham pleaded guilty on February 7, 1939. The federal Government started an investigation in relation to the still in November, 1939. The first proceeding in Federal court was the issuance of a complaint before a U. S. Commissioner on January 17, 1940.

It was the Government's theory that when Perlstein represented Myers and John Graham in the State pro-

ceedings that he did so in order to protect Short and Aluise, his real clients and owners of the still, and thereby conspired with them to obstruct the due administration of justice in Federal court.

Myers, a Government witness, was permitted, over objection, to testify that when Perlstein represented him at the time of the still seizure, he told him "to keep his mouth shut" (R. 165-168). John Graham was permitted to testify, over objection, that Perlstein advised him not to talk and later advised him to plead guilty (R. 50-57).

Perlstein offered himself as a witness, in his own defense, and testified that his actions were solely those of an attorney representing his clients, and that his advice to Myers and John Graham was to inform them, they being under arrest, of their constitutional rights to refuse to testify, if to do so would tend to incriminate them. Graham had admitted to Perlstein that the lease he made to Short for the still was a fake (R. 115) and that he had an interest in the still. He received no rent from Short (R. 75) and when Short was called by the Government as a rebuttal witness, he testified on cross-examination, that when he put the still in the Garbage Disposal Plant he told Graham the purpose for which he was renting the premises and that Graham allowed him to install the same for that purpose (R. 305). After Graham pleaded guilty, the relationship of attorney and client between him and Perlstein came to an end.

All the above matters related to overt acts 1 and 2 of count 1 of the indictment, and were in point of time, before any proceedings were pending in Federal court.

The undisputed testimony is that Harry Paul's first appearance in the case was near the end of January, 1940. His first contact with Aluise was at that time (R. 189). It came about in this manner: The agents had questioned Aluise for 8 hours upon his release from a hospital.

Aluise's employer, sympathizing with him, hired Paul to represent him. Aluise told Paul that he had worked at the still in 1937, being hired by Short and Jacobs (R. 189-190). Aluise asked Paul also to represent John Graham for the purpose of ascertaining the nature of the Government's inquiry. After speaking to Graham, Paul consented to serve him in this connection provided that Graham would tell him the truth (R. 191). Graham told Paul that he, Henry and Dilks were each to get 10 per cent of the proceeds of the still (R. 192). Paul went to Philadelphia on February 5, 1940, and attempted to ascertain from agent Rogers what the Government wanted of these two men. He likewise went to the Alcohol Tax Unit in Camden for the same purpose. In each instance he was given no information (R. 191-193). Paul testified that he then went to Government counsel and was told by him that he knew nothing about the matter and did not ever have a file on it (R. 193). Later Paul received a call from Aluise advising him that Graham, while under the influence of liquor, was threatening to make trouble for everybody and demanded a meeting (R. 194). At the request of Aluise, Paul consented to be there. A meeting was called, to be held at the Temple of Knowledge, where Aluise worked. John A. Graham presented himself with a close friend of his with whom he had lived, namely: John Edward Cannon. Attention is called to the fact that Graham had been to see the Government agents and that Cannon knew this (R. 140). The defendants, Paul, Short and Perlstein, were waiting for Graham at the time of his arrival. They then tried to gain access to the Temple of Knowledge, but were unsuccessful as it was not open every night in the winter. They then decided to go to Applegate's Tavern and Restaurant instead (R. 194). This was on February 20, 1940. After arriving there, Graham immediately demanded money. Several arguments ensued, one

being between Short and Aluise. Short accused Aluise of identifying him as the boss of the still and he rebuked Aluise for it. Paul never met Short until 1940. When Graham demanded money of Short it was refused. Graham had demanded money weekly from Aluise until Paul became his counsel. Paul testified that he immediately instructed Aluise to give him no more money. Two weeks later another meeting was demanded by Graham, who presented himself in a drunken condition. The only thing that happened at this meeting was that Graham called Short into another room and after having a conversation with him, outside of the presence of Paul and Perlstein, the meeting broke up (R. 195-199).

Perlstein testified that he attended the first meeting as a result of a long distance telephone call from Philadelphia by Short. Short explained to him that Graham was demanding money from him and that he wanted Perlstein to represent him and advise him. Prior to that, in January, 1940, Short had sought legal advice from Perlstein and had, through his wife who was present, paid him $25 for his services (R. 271-272). Perlstein testified that he never spoke a word at the meeting, and that he was there solely to make observations in order to be able properly to advise his client. In fact, he went there with that sole thought in mind (R. 274-275).

Prior to March 4, 1940, Short saw Edward S. Graham on two occasions and threatened him if he should identify his picture before the Grand Jury. Edward S. Graham testified that on March 4, 1940 Short, with Paul, came to his home in Philadelphia and Short asked him whether he had identified his picture when he talked to the Government agents. Graham further testified that Short, again, threatened him in the event he did so (R. 145-149). He stated that, as they were leaving, Paul said that he wanted to meet him in Atlantic City, to which he replied

that he had no occasion to go down there (R. 149). He did not testify that Paul threatened him or spoke to him in reference to the identification of Short's picture.

The Government offered proof of another overt act alleged to have taken place on March 27, 1940. On that date Henry S. Speed and John Graham, who were going to Camden, New Jersey, to testify before the Grand Jury, asked Paul to accompany them (R. 176). Speed testified that Paul slept most of the way to Camden and that after he awakened he stated to Speed that he could have a lapse of memory concerning the identification of the photographs of Short and Aluise (R. 176). Speed had furnished the pipe fittings and a tank and had repaired a tank for Short and Aluise in June, 1937, when the still was installed (R. 172). Paul denied that he ever told Speed to have a lapse of memory (R. 207) but testified that it was John Graham who made that statement to him while they were driving to Camden.

(c)

Rulings of Court.

The defectiveness of the indictment and the infirmity of the proofs were raised in the court below at the second trial by petitioners' motions to quash (R. 23-31) and in arrest of judgment (R. 354). Both motions were overruled (R. 30, 370). Error was assigned (R. 374, 382). The Circuit Court on appeal therefrom overruled the assignments and, by a 3 to 2 majority, affirmed the judgment. To do so the Circuit Court necessarily held that the pendency of a proceeding in a court of the United States or before a Commissioner is not a prerequisite to an indictment for conspiring to intimidate witnesses and to obstruct justice "therein" in violation of Sec. 135 of the Criminal Code. It thereby refused to recognize the ruling of the Supreme Court in *Pettibone* v. *U. S.*, 148 U. S. 197.

In addition to the Trial Court's refusal to quash the indictment and to sustain the motion in arrest of judgment, another very serious situation confronted the petitioners at the second trial. Although the judgment of conviction on count 1 was reversed by the Circuit Court on the first appeal for errors committed at that trial, the Court, however, held in 120 F. (2d) 276 at 282 the following in relation to its interpretation of *Pettibone* v. *U. S., supra:*

> "The present case involves the administration of criminal justice and therefore presents a totally different situation. Every person who commits a criminal offense is bound to know that if his crime is detected prosecution will follow. If, therefore, he and others agree upon action calculated to enable him to prevent, evade or escape such prosecution and overt acts follow they thereby make themselves guilty of a criminal conspiracy to obstruct the due administration of justice, even though either because of their machinations or for some other reason the prosecution is delayed or never actually results. It we were to hold otherwise, we would put a premium upon the success of such a conspiracy in preventing prosecution, until after the statute of limitations has run. We do not think the decision in Pettibone *v.* United States was intended to support such a proposition."

In so holding the Circuit Court repudiated the law as set forth by the United States Supreme Court in *Pettibone* v. *U. S., supra,* which established the law of the land in construing the crime of conspiracy to violate Sec. 135 of the Criminal Code (18 U. S. C. S. Sec. 241).

It is manifest that the trial court was troubled with the situation, feeling that a conspiracy to influence witnesses, etc., should not go unpunished. With this we agree. The court, however, apparently did not realize that such a conspiracy in October, 1937, would be one, not to obstruct the

due administration of justice in the U. S. Courts or corruptly to influence witnesses therein, *but would be a conspiracy to compound the commission of a crime or to commit mispresion of felony.* This is an entirely different crime from the one for which the petitioners were indicted under count 1 and was included as a part of count 2 on which count the petitioners were acquitted. The trial court seemed very much impressed but stated that he could not reverse the opinion of the Circuit Court, which he, himself, had written (R. 27, 30, 366). As a consequence the petitioners were not tried by the "law of the land" but by the "erroneous law of the case" as set forth in 120 F. (2) 276. The application of this doctrine violated their constitutional rights by compelling them to stand trial for an offense not charged in the indictment and thereby depriving them of their liberty without due process of law.

Opinions Below.

This case was first tried before Judge Goodrich and a jury on June 10, 1940. At the close of the Government's case the trial court dismissed the second count as to petitioner Paul and the jury returned a verdict of not guilty on the second count as to the petitioner Perlstein. The jury returned a verdict of guilty on the first count as to both petitioners and a verdict of guilty on both counts as to Short and Aluise.

Petitioners appealed to the Circuit Court, which court reversed the convictions and ordered a new trial. The case is reported at 120 F. (2) 276. The opinion was written by Judge Maris with Judge Jones concurring. A dissenting opinion was written by Judge Clark.

The case came on for a second trial on June 2, 1941, before Judge Maris, sitting as a District Court Judge, and a jury. After deliberating 22 hours the jury again found petitioners guilty on the count for which they were on trial,

namely, count 1. After verdict, motions in arrest of judgment and for a new trial were made (R. 354) and denied (R. 355), the opinion being reported in 39 F. Supp. 965. Both petitioners were sentenced on August 1, 1941, to serve a term of imprisonment for one year and one day.

An appeal again was taken to the Circuit Court. The case was first argued before Judges Biggs, Jones and Kirkpatrick on October 23, 1942. Thereafter, on December 23, 1942, Judge Biggs made an order (R. 388) for a rehearing of the case before the court *en banc* adding Judges Goodrich and Clark as members of the court. The decision of the court *en banc* resulted in an affirmance of the conviction by a 3 to 2 vote, Judges Jones and Kirkpatrick dissenting. The opinion, of which review is sought, is unreported but appears in the record at page 390.

Jurisdiction.

The judgment below was entered February 20, 1942, (R. 388-425). A petition for rehearing within the fifteen days allowed for such petitions by Rule 35 of the Rules of the Third Circuit was filed March 5, 1942 (R. 426-430) and was by the court denied March 16, 1942 (R. 431).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347), and Section 5 (b) of Rule 38 of this Court.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C. A. Title 18 Sec. 88):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such con-

spiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 135 of the Criminal Code (U. S. C. A. Title 18 Sec. 241):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any Court of the United States or before any United States Commissioner or officer acting as such Commissioner, or any Grand or Petit juror, or officer in or of any Court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or officer acting as such Commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Questions Presented.

1. Whether an indictment is valid which charges petitioners with the crime of conspiracy "on or about the 15th day of October, 1937 (contrary to Sec. 37 of the Criminal Code) to intimidate and impede witnesses and to obstruct the due administration of justice in a court of the United States or before a United States Commissioner (in violation of Sec. 135 of the Criminal Code) notwithstanding the fact that no proceeding was instituted until January 17, 1940, a period of more than two years after the formation of the alleged conspiracy, and considerably after two specific overt acts were alleged to have been committed, the first on October 15, 1937, and the second on February 7, 1939 (R. 13-19).

2. Were the petitioners properly convicted on an indictment charging them with conspiracy to obstruct the due

administration of justice in violation of Section 135 of the Criminal Code when the conspiracy was entered into at a time when there was no proceeding pending in the District Court of New Jersey, or before a United States Commissioner, though continued into a period when there were proceedings pending both in that court, and before a United States Commissioner, and overt acts in furtherance of the alleged conspiracy were committed both prior to and after the commencement of the proceedings referred to (R. 13-19)?

3. Whether the elements which would have been necessary to be proved to convict the petitioners for the substantive crime of violating Section 135 of the Criminal Code must not adhere in a charge of conspiracy to commit that offense, those elements being: That at the time of the commission of the offense there was a proceeding pending in a United States Court and that certain persons were witnesses therein, and that the petitioners had knowledge of both facts, and with such knowledge endeavored corruptly to influence, intimidate or impede those witnesses in that proceeding?

4. Whether the Circuit Court erred in overruling petitioners' contention that the trial court should have quashed the indictment for defectiveness and the infirmity of proofs thereunder at the trial, when petitioners made a motion to quash the indictment at the beginning of the trial (R. 23-31) and also made a motion in arrest of judgment after the jury's verdict (R. 354)?

5. Whether the petitioners, who were convicted by the erroneous "law of the case" instead of by the "law of the land" were not thereby deprived of their liberty without due process of law (R. 27, 30, 366)?

ARGUMENT.

The Circuit Court approved the action of the trial court in denying the petitioners' motion to quash the indictment and their motion in arrest of judgment. In so doing, the conclusion of the majority in this case seems to be directly in the teeth of the ruling of the Supreme Court in the *Pettibone* case, *supra.*

The report of the *Pettibone* case shows that an injunction had issued out of a United States Court in an equity suit involving a labor dispute; that certain of the respondents against whom the injunction was directed violated its restraints; and that thereupon they were indicted for conspiring (contrary to R. S. 5440, now Sec. 37 of the Criminal Code) to obstruct justice in a proceeding (the injunction suit) in a court of the United States in violation of R. S. 5399, now Sec. 135 of the Criminal Code. The indictment in the *Pettibone* case failed to allege that the defendants knew or had notice of the existence of the injunction, i. e., that justice was being administered in a Court of the United States. The Supreme Court reversed the judgment of guilt and remanded the case to the District Court with directions to quash the indictment and discharge of the defendants. In so doing, the Court held (p. 206) that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a Court unless it appears that he knew or had notice that justice was being administered in such Court." And further, at p. 207, the Supreme Court said that "such obstruction can only arise when justice is being administered. *Unless that fact exists,* the statutory offense cannot be committed; * * *." (Emphasis supplied.)

The crime dealt with in the *Pettibone* case was precisely the same character of crime charged against the petitioners in the instant case. But, as we have already seen, there

was a proceeding actually pending in a court of the United States at the time of the alleged conspiracy in the *Pettibone* case, while here there was none, nor was there any for more than two years after the conspiracy allegedly had been matured into an indictable offense by the commission of an overt act. A *fortiori,* the rule in the *Pettibone* case should be applicable here.

No distinction between the *Pettibone* and the instant case is logically admissible on the basis asserted that "in the *Pettibone* case the Supreme Court was passing upon a violation of the injunctive process of the District Court". That case was *not* concerned with "a violation of the injunctive process" of any court. What the *Pettibone* case dealt with was an alleged conspiracy to obstruct the due administration of justice in a court of the United States and the *allegata* and *probata* required to support the charge. Nor can it be of any materiality to the *Pettibone* decision that the justice in that case, at whose obstruction the alleged conspiracy was aimed, was being administered in a civil rather than in a criminal proceeding. The thing which the Statute (Sec. 135 of the Criminal Code) makes criminal, in presently relevant regard, is the intimidation of witnesses or the obstruction of justice in a court of the United States, regardless of whether the justice there being administered is at law, either civil or criminal, in equity, in admiralty, or in bankruptcy. As no valid reason is advanced by the majority why "the *Pettibone* case does not support the petitioners' position," it is contended it continues to rule where, as here, Secs. 37 and 135 of the Criminal Code are involved. It has been recognized elsewhere.

In *Odom* v. *United States,* 116 F. (2d) 996 (C. C. A. 5), the defendants had set upon and beaten one Stansbury, who had been a witness in a Federal court and expected to testify thereafter in the same cause. The Court of Appeals, after

pointing out (p. 998) that "The two sections of the Criminal Statutes here involved were expounded in *Pettibone* v. *United States,* 148 U. S. 197," said that "It is necessary to federal jurisdiction in this case to prove that there was a proceeding in the Courts of the United States, and that Stansbury was a witness therein, and that the accused had knowledge of both facts, * * *." True enough, the conviction in the *Odom* case was sustained, but that was because there was proof from which the jury could find the requisite scienter. The rule there applied respected, none the less, the requirements of the *Pettibone* decision under which it must be taken as settled that knowledge or notice of the pendency of a proceeding in a court of the United States or before a Commissioner is necessary for a violation of Sec. 135 of the Criminal Code and, by the same token, is a requisite averment of an indictment for conspiracy to violate Sec. 135.

In *Fulbright* v. *U. S.,* 91 F. (2d) 210 (C. C. A. 8), at 212, the Court likewise recognized the same rule holding:

> "It is immaterial, of course, whether the defect exists in the indictment *or in the proof.* The object of the *conspiracy* charged in the indictment is limited by the statute defining the substantive crime. To establish the illegal conspiracy therefore it was incumbent upon the Government to *prove* that the conspirators had 'notice and knowledge' that federal warrants had been issued for the arrest of S. and L. General malevolence is not enough if the specific knowledge required by the statute is lacking." *Pettibone* v. *United States, supra; Piquett* v. *United States,* 81 F. (2d) 75.

The need for averment and proof of scienter in order to sustain an indictment and conviction for the substantive offense under Sec. 135 has been recognized generally and will hardly be disputed. *Walker* v. *U. S.,* 93 F. (2d) 792,

795 (C. C. A. 8); *Kloss* v. *U. S.*, 77 F. (2d) 462, 464 (C. C. A. 8); *Genna* v. *U. S.*, 293 Fed. 387 (C. C. A. 7); *U. S.* v. *McLeod*, 119 Fed. 416, 418 (C. C. N. D. Ala.); *U. S.* v. *Armstrong*, 59 Fed. 568, 569 (S. D. Cal.); *U. S.* v. *Kee*, 39 Fed. 603, 604 (D. S. C.); *U. S.* v. *Bittinger*, 24 Fed. Cas. No. 14,598 (W. D. Mo.). Manifestly, without knowledge or notice of the pendency of a proceeding in a court of the United States, there can be no intent to obstruct the due administration of justice "therein". Yet "the specific intent to violate the statute must exist to justify a conviction * * *." That was said in the *Pettibone* case (p. 207) where, it will be remembered, the question present related to a *conspiracy* to violate Sec. 135. How, then, can scienter be alleged or proven when the thing whereof one needs have knowledge or notice does not exist? Such is this very case. Under the circumstances obtaining, the failure of the indictment to allege the petitioners' knowledge or notice of the requisite proceeding is readily understandable. In fact, the omission thereof in this case was made even more "advisedly" than it was in the *Pettibone* case where there was a proceeding actually pending. In any event, the failure to allege scienter in the *Pettibone* case was fatal to the indictment in that case. It can be no less fatal here where there was no proceeding about which to conspire.

However, it is argued by the majority that, assuming a conviction for the substantive offense under Sec. 135 could not be sustained on the facts alleged in the indictment in this case, still, by some legal alchemy, when Sec. 135 is applied in combination with the conspiracy statute, there emerges an otherwise undeclared Federal offense, namely, a conspiracy to obstruct justice without regard for any proceeding in a court of the United States or before a United States Commissioner. How can that be? Certain it is that the conspiracy statute, when applied in conjunction with Sec. 135, does not operate to withdraw the neces-

sity for averment and proof of any of the elements requisite to a charge of the substantive offense. *Cf. Gebardi* v. *U. S.*, 287 U. S. 112, 123. It is not a crime under the terms of Sec. 37 to conspire to commit that which a Federal statute does not denounce as an offense against the United States. In *U. S.* v. *Biggs*, 211 U. S. 507, 521, the Supreme Court rejected the contention that "it is unlawful under the (conspiracy) statute to conspire to have that done which the (substantive) statute did not prohibit * * *." In *Fulbright* v. *U. S.*, 91 F. (2d) 210, 212 (C. C. A. 8), the Court said that "If the act is not prohibited by Congress, it is not unlawful to conspire to do it." And, in *Fain* v. *U. S.*, 209 Fed. 525, 531 (C. C. A. 8), it was said that "It is neither criminal nor unlawful to do or conspire to do that which the law does not prohibit * * *." Consequently, it is not possible under the Federal statute (Sec. 37) unlawfully to conspire to commit an offense which, under the facts averred and proven, could not be committed under the requirements of the statute defining the substantive offense.

The question here involved is not to be solved by confusing the Federal crime of conspiracy to obstruct justice in a court of the United States with the crime of perverting or obstructing justice without regard for the particular place where justice is being administered, which is an offense in some jurisdictions either at common law or by local statute. Such are the cases of *Rex* v. *Sharpe* and *Rex* v. *Stringer*, 26 Cr. App. Rep. 122, 1 All. E. R. 48, and the New York County General Sessions case of *People* v. *McCue*, 139 Misc. 790, 250 N. Y. S. 161, which the majority cite and quote from *in extenso*. Those cases can have no bearing upon the meaning and effect of a Federal statute. They do not even furnish comparable basis for an argument by an analogy. To say, as do the majority, that "The end in view (of the conspiracy at bar) was the obstruction of justice, both State and Federal" is not germane to the issue and only further

illustrates the failure to discriminate between the relevant Federal crime (conspiracy to obstruct justice in a court) and the unrelated crime in other jurisdictions of conspiring to obstruct justice.

There is no Federal statute or statutes which denounce simply the obstruction of justice. And, of course, what a Federal statute does not make criminal is not an offense against the United States. As is well recognized *there are no common law offenses against the United States. U. S.* v. *Eaton,* 144 U. S. 677, 687. In no event could the legislative history to which the majority make reference in a footnote, even if pertinent, be deemed to invite extension of the congressional intent beyond the plain words of the statute and, certainly, not so as to embrace, thus facilely, common law crimes within Federal offenses.

A necessary corollary of this Court's ruling in the instant case is that an indictment and conviction for a conspiracy to intimidate witnesses or to obstruct justice in a court or before a commissioner may be sustained even though such a proceeding in material respect is never instituted. Government counsel freely conceded before the Circuit Court, both by brief and at bar, that such is indeed the Government's contention. This concession is but the necessary concomitant of a rule which would confirm guilt of conspiracy to obstruct the due administration of justice in a court of the United States before any relevant proceeding is instituted therein. Yet, the conspiracy made punishable by Sec. 37 of the Criminal Code occurs when the minds of the parties thereto meet in agreement for the attainment of the illegal object by concert of action. The crime does not lie in the recurrent acts subsequently, performed by one or more of the conspirators in furtherance of the object of the conspiracy. Proof of an overt act is necessary because of the statute's specific requirement thereof as a prerequisite to an indictment and conviction for the conspiracy.

Hyde v. *U. S.*, 225 U. S. 347, 359. The overt act marks the passing of the *locus penitentiae*. *U. S.* v. *Britton*, 108 U. S. 199, 205. And, immediately consequent upon the first overt act, the conspiracy passes from words or understanding to criminally culpable conduct. The illegal combination or concert being the offense of conspiracy, the Supreme Court said in the *Britton* case, *supra*, at p. 205, that it is "a rule of criminal pleading that in an indictment for conspiracy under Section 5440 (now Sec. 37), the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

In the instant case the indictment alleges that the conspiracy was entered into "on or about the 15th day of October, 1937" and further that on the same day (specifically October 15, 1937) an overt act was committed in furtherance of the object of the conspiracy by one or more of the defendants. From this, it necessarily follows that the petitioners were as indictable for the alleged conspiracy on October 15, 1937, as they ever were at any time thereafter; and that conspiracy is the one and only offense charged by the indictment. It is apparent, therefore, that if the indictment in this case be held valid, the petitioners could have been indicted, tried, convicted and have served a sentence for the conspiracy prior to the institution of the proceedings before the Commissioners or in the United States Court in January of 1940. Obviously, in such circumstances the ultimate proceeding was wholly immaterial to the indictment and conviction. In order to arrive at a rule which produces the situation just indicated it is necessary to disregard the plain words of the statute and the meaning heretofore attached to them by the Supreme Court.

The thing at which the statute (Sec. 135) is directed is the intimidation of witnesses "in any court of the United States or before any United States Commissioner" or the

obstruction of "the due administration of justice *therein* * * *." Wherein? Necessarily, "in any court of the United States or before any United States Commissioner". Such has been the considered interpretation of the word "therein", as used in the statute, with respect to its plainly intended reference. See *U. S.* v. *McLeod*, 119 Fed. 416 (C. C. N. D. Ala.), where the court said (p. 419) that "This statute does not create the offense of obstructing justice in general or in the abstract." That is a clear recognition of the effect of the crucial limitation prescribed by the words of the statute. In the *McLeod* case, the court further said (p. 417) that "But for the restraining influence of the word 'therein', the words 'due administration of justice' might perhaps be held to include practices subversive of the general administration of justice, regardless of their effect upon any particular case." While the majority of the Circuit Court cite and apparently accept the view expressed in the *McLeod* case, *supra*, they then go on to say that "If we were construing this statute as a matter of original impression we would have held this phrase ("due administration of justice therein") to be one of enlargement and not of limitation * * *." For what reason? The word "therein" prescribes a qualification which may not be ignored. Moreover, the statute is penal and, therefore, not to be enlarged by any supposed intendment. *Cf. Todd* v. *U. S.*, 158 U. S. 278, 282. This Court recently ruled in the same manner in *Pierce* v. *U. S.*, 62 S. Ct. 237, 240.

If a pending proceeding in a court of the United States or before a United States Commissioner were not necessary to a charge of intimidating witnesses or of obstructing the due administration of justice therein, then the further ruling in the *Todd* case, *supra*, would be wanting in justification. In that case, the Supreme Court reversed the District Court's order, overruling a demurrer to the indictment, because the indictment alleged a conspiracy to

intimidate witnesses in a proceeding before a United States Commissioner when at that time (1895) the then relevant statute (R. S. Sec. 5406) embraced no more than a conspiracy to intimidate witnesses "in any Court of the United States" without mention of United States Commissioners. As a consequence, the Supreme Court there held (p. 284) that "* * * As a preliminary examination before a Commissioner cannot be considered a case *pending* in any Court of the United States, it follows that this indictment is fatally defective and charges no offense against the laws of the United States." Patently, if a pending proceeding had not been considered necessary to an indictment under R. S. Sec. 5406 for conspiracy to intimidate witnesses, it would have been wholly immaterial in the *Todd* case, where the proceeding, if any, obtained. R. S. Sec. 5406 was thereafter amended by Act of March 4, 1909, c. 321, Sec. 136, 35 Stat. 1113, so as to embrace a conspiracy to intimidate witnesses "in any examination before a United States Commissioner" and, as so amended, became Sec. 136 of the Criminal Code. The history of Sec. 135 of the Criminal Code with which we are here concerned, is identical, in such regard, with the history of Sec. 136. So that what the Supreme Court held with respect to R. S. Sec. 5406 in the *Todd* case is equally pertinent to R. S. Sec. 5399, the predecessor of Sec. 135.

The ultimate filing of the complaints before the Commissioners in January and February of 1940 and the institution of the Grand Jury investigation about the same time can hardly supply the proceeding contemplated by the statute in respect whereof the alleged conspiracy could have been formed in October of 1937. If such were the case, then there would be as many separate conspiracies developed out of the one combination or agreement for concerted action as there were related proceedings thereafter instituted. In this case, that would mean three crimes of

conspiracy, although the indictment charges only one. If a subsequently instituted proceeding matures into criminality the priorly formed conspiracy, then, under the majority's reasoning, the alleged conspiracy in this case became a crime when the first complaint was filed before the first Commissioner on January 17, 1940, a second crime when the second complaint was filed before the other Commissioner on February 14, 1940, and another crime when the Grand Jury proceeding was instituted about the same time. There is no reason why the proceeding first begun should exhaust the function of the succeeding proceedings so far as supporting a charge of obstructing justice is concerned. Furthermore, it is unusual, to say the least, for the commission of crime to be made to depend upon a condition subsequent whose existence can alone result from the independent action of others (Federal officers) who manifestly are unconnected with the conspiracy but have it within their power to determine whether or not to start the efficient proceeding.

Nor does the conspiracy become criminal, after a proceeding is instituted, on the ground that it is a continuing thing. Most conspiracies are continuous in the sense that they ordinarily endure for a period of time for the achievement of their intended end. But, where a conspiracy has been held to be continuous, it will be found to have been a conspiracy for the commission of an offense committable from the outset and, so, capable of continuing for successive achievements of the same purpose, such as combinations in restraint of trade. See *U. S.* v. *Kissel*, 218 U. S. 601, 607. It is also believed that no case can be found where the alleged conspiracy entered into when its offensive object was legally uncommittable has been held to continue until the offense could be committed and thereupon rendered criminal thereby.

The case of *Williamson* v. *U. S.*, 207 U. S. 425, 447, cited by the majority, furnishes no basis for an argument that an indictment will lie for conspiring to commit an uncommittable offense against the United States. In the *Williamson* case the defendants were charged with conspiring to suborn perjury in violation of R. S. Sec. 5393 (now Sec. 126 of the Criminal Code). Subornation of perjury is thus itself an offense against the United States. And a conspiracy to suborn perjury is likewise a crime because it is a conspiracy to commit an offense against the United States (Sec. 37). The crime of conspiring to suborn is unaffected by the fact that to commit the substantive offense of suborning perjury it must be shown that perjury was committed as a consequence of the subornation. That requirement goes only to the degree of proof necessary to convict for the substantive offense. The offense is none the less a committable one at the time the conspiracy is formed in that witnesses are *in esse* upon whom an effort can be made to induce them to testify falsely. In no case does the crime of conspiracy depend upon the degree of success achieved in the furtherance of its object. For instance, under Sec. 135, here involved, a conviction for conspiring to intimidate witnesses in a court of the United States might well be sustained although the conspirators could not be convicted of the substantive offense if they never intimidated nor actually endeavored to do so. Failure to establish the substantive offense because of lack of effort on the part of the conspirators is an entirely different matter than inability to prove the substantive offense because there was no proceeding pending in respect whereof witnesses might be intimidated and justice might be obstructed.

The erroneous law of the case as heretofore quoted under "Rulings of the Court", also appears in 120 F. (2d) 276 at 282. The Trial Court (R. 366) stated "We (meaning I)

need not pass upon the argument that the indictment does not charge an offense. This argument was advanced without success by the defendants in their appeal to the Circuit Court of Appeals. Whatever may be the rights of the defendants to relitigate this issue in the court which rendered the decision, that decision is binding upon this Court as the law of the case." In the footnote several cases are cited. No authority is cited for the application of this rule to a criminal case. Petitioners claim it does not apply. They contend that in being tried by the law of the case instead of the law of the land, to wit, the *Pettibone* case, they have been deprived of their liberty without due process of law. *Thornhill* v. *Alabama*, 310 U. S. 88.

Reasons Why the Writ Should be Granted.

1. The Circuit Court has decided this case in direct conflict with the decision of the Supreme Court in *Pettibone* v. *U. S.*, 148 U. S. 197, on an important point of federal law, namely, the elements necessary to be averred in an indictment and proved at trial on a charge of conspiracy (Sec. 37 of the Criminal Code) to intimidate and impede witnesses and to obstruct the due administration of justice in a court of the United States or before a United States Commissioner (in violation of Sec. 135 of the Criminal Code). It thereby attempts to overrule an important decision of the United States Supreme Court and unsettles the law.

2. The Circuit Court has decided this case in direct conflict with the decisions of the Circuit Court of Appeals for Fifth Circuit in *Odom* v. *U. S.*, 116 F. (2d) 996 and of the Eighth Circuit in *Fulbright* v. *U. S.*, 91 F. (2d) 210, on an important point of Federal law, namely, the elements necessary to be averred in an indictment and proved at trial on a charge of conspiracy (Sec. 37 of the Criminal Code) to

intimidate and impede witnesses and to obstruct the due administration of justice in a court of the United States or before a United States Commissioner (in violation of Sec. 135 of the Criminal Code). The decision thereby produces a conflict among the Circuit Courts which should be settled by the Supreme Court.

3. The questions presented in this case are of great importance to the public. The dissenting opinion of Judge Jones, joined in by Judge Kirkpatrick (at R. 408-409), sets forth the following: "There appears to be no logical escape from the conclusion that refusal to apply to the facts of this case the rule of the *Pettibone* case works approbation of a conviction obtained upon a Federal indictment which utterly failed to charge the defendants with an offense against the laws of the United States. If that be so, then obviously, the disposition which this Court now makes of the instant appeal far transcends in its effect generally the importance of the case to the parties immediately concerned."

4. There is involved in the decision of the Circuit Court a dangerous threat to individual liberty, contrary to the Constitution. The dissenting opinion (R. 422, last par.) sets forth: "if what the majority now hold be the law, then all that will be necessary to convict of conspiracy to intimidate witnesses and to obstruct justice under Sec. 135 of the Criminal Code will be a couple of locally unpopular defendants who happened to be seen talking together. The overt act necessary to mature the time for indictment and punishment may, as is well known, be a very incidental and inconsequential thing. The threat to individual liberty concealed in the proposition now approved by this Court is not to be minimized, and, particularly not in times when popular passions may be more easily aroused. It invites

the sort of possibility which courts should ever be alert to prevent."

Conclusion.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Third Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket: Number 7794 *United States of America* v. *Benjamin M. Perlstein and Harry Paul,* to the end that said case may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code (U. S. C. A., Title 18, Section 347), and that the judgment of the Court of Appeals for the Third Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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